No. 466.

IN THE

U. S. Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error.

vs.

FRANK E. DINGLEY, as Administrator of the Estate of Walter F. Dingley (deceased),
Defendant in Error.

Brief of Plaintiff in Error.

In Error to the Circuit Court of the United States for the District of Washington, Northern Division.

THE IRWIN-HODSON CO., Blank Book Makers, Printers, Lithographers, Stationers, Portland, Or.

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STATEMENT.

This is an action brought by the defendant in error, upon policy No. 628,645, issued by the New York Life Insurance Company upon the life of one Walter F. Dingley, defendant in error's intestate. The policy is for the sum of $5,000, and a copy thereof

appears in the printed record, at page 5, and a *fac simile* thereof is appended to said record.

The complaint is in the usual form. It sets forth the policy in full, avers the death of the insured, the appointment and qualification of defendant in error as administrator of the estate of the decedent, compliance on the part of the insured with all the conditions of the policy by him to be performed, due presentation of proofs of death of said insured, demand of payment and refusal thereof. The answer denies liability, pleads the law of New York with reference to statutory notice of maturing premiums, avers the giving of the notice required, in due form, and the lapse of the policy for non-payment of the premium of 1896, all of which more fully appears in the printed record.

By the terms of the policy, as expressed on the face thereof, and in the receipt, Exhibit A A, and as charged in the answer, the premium of $158 was payable annually in advance on July 19 of each year during the life of the policy. Two premiums, aggregating $316, were paid on said policy, being the premiums thereon for the years 1894 and 1895. No other premiums were ever paid on said policy. In the application for the policy, which was signed by the insured, a copy of which appears in the record, at page 77, he gave his postoffice address as Oakland, Alameda County, California. Subsequently, to-wit: on April 9, 1895, the insured duly notified the company in writing that he had changed his residence to Seattle, Washington, and requested that thereafter all notices

should be mailed to him, addressed to P. O. box 1272, Seattle, Washington.

This change of address was duly noted in the books of the company, and was thereafter the post-office address of said insured, last known to the company. A copy of the writing in question appears in the record at page 80.

The law of New York, as set forth in the record, page 36, provides that no life insurance corporation doing business in that state, shall declare forfeited or lapsed any policy thereafter issued, unless a written or printed notice stating the amount of such premium due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, at his last known postoffice address, postage paid by the corporation or by an officer or agent thereof, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice is also required to state that unless such premium then due shall be paid to the corcorporation or to a duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of said policy in respect to the time of such payment; and no such policy shall in any case be forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The

law further provides that the affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice to the effect that the notice required by the section in question has been duly addressed and mailed to the insured by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given.

As before stated, the due date fixed by the terms of the policy in question was July 19 in each year while the policy continued in force. The annual premium on said policy No. 628,645 for the year 1896 fell due, therefore, on the nineteenth day of July of that year. On the twenty-seventh day of June, 1896, Ben. Clements, mailing clerk of the company, at its San Francisco office, deposited in the United States postoffice in San Francisco, State of California, a notice from the company, duly enclosed in an envelope addressed to Walter F. Dingley, Postoffice Box 1272, Seattle, Washington, postage fully prepaid by the company, which notice is set forth here in full for the convenience of the Court. It was printed on a card, and reads:

"2. Bring this card with you when paying premium or enclose it with your remittance.

"The New York Life Insurance Company hereby gives notice that on Policy No. 628,645 a premium of $158.00 will be due July 19, 1896, provided the policy be then in force.

"This premium will be due and payable at the Home Office, 346 & 348 Broadway, New York, to the

Cashier of the Company, or to Fred G. Redding, Cashier, Mills Building, San Francisco, Cal., on the production of the official receipt therefor.

"Unless such premium then due shall be paid to the company or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, such policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid up policy which may be provided in such policy, or by statute. This notice is required by the law of New York, and does not modify any of the terms of the contract.

"JOHN A. MCCALL,
"President.

"Remittance should be made by Bank Draft, Post Office or Express Money Order, or Certified Check, payable to the order of the New York Life Insurance Company. (over)

"NOTICE TO POLICY HOLDERS.

"No agent has power in behalf of the company to make or to modify any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or by making or receiving any representation or information. These powers can be exercised only by the President, Vice President, Second Vice President, Actuary or Secretary of the Company and will not be delegated.

"All premiums are due and payable at the Home Office of the Company unless otherwise agreed in

writing, but any premium may be paid to an agent producing a receipt therefor, signed by the President, Vice President, Second Vice President, Actuary or Secretary, and countersigned by such agent. If any premium is not thus paid on or before the day when due, then (except as otherwise provided) the policy shall become void, and all payments previously made shall remain the property of the company.

"If any premium is not paid upon the date when due, a grace of one month is allowed by the company within which the overdue premium will be accepted if paid with interest at the rate of 5 per cent. per annum. During this month of grace the policy is continued in full force.

"The acceptance of any premium by the company after the expiration of the one month's grace is subject to the condition, and upon the express warranty on the part of the holder of the policy, that the insured is in good health, and is not to be construed as a waiver of the conditions of the policy as to future payments, nor as establishing a course of dealing between the company and the holder of the policy.

"Please notify the branch office to which you pay your premium of any error or change in your post office address, in writing, giving the number of each policy now held by you." (Record, page 63).

The foregoing "Notice to Policy Holders," after the word "over" in parenthesis, was printed on the back of the card, and was either copied *verbatim*

from the provisions of the policy or condensed therefrom, with the exception of the paragraph requesting a notice to the company of any change of address on the part of the insured.

After sending the said notice to the insured at Seattle. in accordance with the instructions contained in W. F. Dingley's letter of April 9, 1895, Mr. Clements made and filed in the archives of the company, an affidavit, showing the fact of the mailing of such notice to the said Dingley, a copy of which affidavit is set forth in the record, at pages 84 to 86.

The premium mentioned in this notice was never paid, the official receipt therefor was returned undelivered and canceled (Record, page 81) and thereafter the policy was lapsed by the company for such non-payment.

On the twelfth of November, 1896, the insured died at Seattle, Washington.

Subsequently the defendant was appointed as administrator of the estate of deceased, and after notifying the company of the death of the assured, payment of the policy was demanded of the company. This demand was refused for the reason that the policy was forfeited and lapsed for non-payment of premium. This action was then brought against the company on the theory that the company had either not given a proper statutory notice under the act of 1893, of New York, or if it had given such notice, could not prove it to the satisfaction of a Seattle jury. At the trial, the plaintiff in error introduced and read

in evidence the affidavit of Mailing Clerk Clements as to the sending of the statutory notice for the year 1896, and also read in evidence the deposition of said Clements, and the exhibits attached thereto, including the copy of notice already set forth in full. No attempt was made to controvert this evidence. Other testimony was offered on behalf of plaintiff in error, and finally both parties rested.

Plaintiff in error then asked the court to give certain written instructions to the jury in its behalf, which are set forth at large in the printed record, pages 66 to 69, as well as in the assignment of errors, *post*.

The defendant in error orally moved the court to instruct the jury to find a verdict in his favor.

The court refused to give the instructions, or any of them, requested by plaintiff in error, to which refusals the plaintiff in error then and there specifically and severally excepted, which exceptions were allowed by the court.

Thereupon the court gave the instruction requested by defendant in error, directing the jury to return a verdict in his favor, stating his reasons therefor as hereinafter set forth in full.

The court then directed the jury to find a verdict for the defendant in error, which was done. Plaintiff in error excepted to this ruling of the court and to the rendition of judgment upon the verdict, which exceptions were allowed. A motion to set aside the

verdict and for a new trial was interposed by plaintiff in error and overruled by the court.

For the error in directing a verdict and giving judgment thereon in favor of defendant in error, and in refusing to give the instructions requested by plaintiff in error, and in not directing a verdict for plaintiff in error and in not rendering judgment in its favor, this writ of error is prosecuted.

ASSIGNMENT OF ERRORS.

The plaintiff in error relies upon the following assignments of error, viz:

"1st. The court erred in refusing to give to the jury the first instruction requested by this defendant, which instruction is as follows:

I.

"'By the terms of the contract between the defendant company and the insured, Walter F. Dingley, the date on which the premium upon his policy of insurance issued him by the defendant, and sued on in this action, became due and payable, was the nineteenth day of July, 1896, notwithstanding the fact that the company had agreed with him that they would not declare a forfeiture of the policy for thirty days thereafter.'

"2nd. The court erred in refusing to give to the jury the second instruction requested by the defendant, which instruction is as follows:

II.

"'I further instruct you that it was incumbent upon the defendant company, before it could declare a forfeiture of the policy upon which this action is brought, to mail to the insured, Walter F. Dingley, at his postoffice address last known to the company, postage prepaid, not less than fifteen nor more than forty-five days before such premium fell due, a notice informing him of the amount of the premium to become due on his said policy, the date when, the place where, and the person to whom the same was payable, and further stating that unless such premium shall be paid to the defendant by or before the day it falls due, the policy and all payments thereon would become forfeited and void.

"'Now, if you shall find from the evidence that the defendant company did mail such a notice to said insured, at his postoffice address last known to the company, not less than fifteen, and not more than forty-five days before the nineteenth day of July, 1896, postage prepaid, and that said insured did not pay or cause to be paid the premium on said policy of insurance falling due thereon on or before said nineteenth day of July, 1896, nor within thirty days thereafter, then said policy, by its terms, became and was null and void, and forfeited, and your verdict must be for the defendant.'

"3rd. The court erred in refusing to give to the jury the third instruction requested by the defendant, which instruction is as follows:

III.

"'I further instruct you, at request of defendant's counsel, to specially answer the following questions:

"'1st. Did the defendant company mail, or cause to be mailed to the insured, Walter F. Dingley, at his postoffice address last known to said company, postage prepaid, a notice informing him of the amount of the premium payable on his policy with the company, the date when, and the place where, and the person to whom the same was payable, not less than fifteen, nor more than forty-five days before the nineteenth day of July, 1896, the due date of said premium, and further notifying him that unless such premium was so paid, his policy and all payments theretofore made thereon, would become null and void and forfeited?

"'2nd. Did the said insured, Walter F. Dingley, pay, or cause to be paid to the defendant company, the premium of $158, falling due on the nineteenth day of July, 1896, or within thirty days thereafter?

"'3rd. Did the said insured, or any one on his behalf, ever pay, or cause to be paid to the defendant company, any premiums on said policy of insurance sued upon in this action, except the first and second, paid in 1894 and 1895?'

"4th. The court erred in refusing to give to the jury the fourth instruction requested by the defendant, which instruction is as follows:

IV.

"'I instruct you to return a verdict in this action in favor of the defendant.'

"5th. The court erred in granting plaintiff's oral motion for a peremptory instruction to the jury to return a verdict for plaintiff.

"6th. The court erred in directing the jury to return a verdict for plaintiff.

"7th. The court erred in thus directing the jury to return a verdict for plaintiff, and in the reasons given therefor as set forth in his oral opinion, a copy of which, as taken by the official stenographer of the court, is as follows:

"'THE COURT: I think that this motion will have to be granted, and these are my reasons:

"'This is a policy of insurance upon the life of the person named, and was written for and intended to be a continuing contract, subject, however, to be terminated as provided in the contract and in the law of the State of New York under which the business was done and which enters into and becomes a part of the conditions of the contract. Now the contract requires the payment annually of the sum of a hundred and fifty-eight dollars as a condition of the insurance. The law of New York, however, steps in and provides that after the contract has gone into effect by the payment of one or more premiums, that the company shall not have the right to terminate its liability unless it gives a notice containing matters

which the law specifies must be in that notice. The giving of the notice is a method and procedure prescribed by the statute, and the only way and only method by which the termination of the contract can be effected, so as to relieve the company of its liability. I do not believe that it is necessary that the precise wording of the statute shall be followed in the language of the notice, but the substantial things that are provided for a matter of intelligence and warning that the statute requires to be in the notice must be given clearly, explicitly and unequivocally.

"'Now, passing by some of the criticisms that have been made upon this notice, and the point most strenuously argued by counsel, that the time of giving the notice was not the proper time, as to which there is a good deal of uncertainty in my own mind, I think this notice is void because of its uncertainty as a warning that the company had, or would, in the event of non-payment of the premium on a fixed day, exercise its right of election to forfeit the policy. The statute says plainly, "that the notice shall also state that unless such premium, interest, installment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid up policy as in this chapter provided."

"'Now, the intention of this statute is to require the company to inform the insured that it will exer-

cise its right to terminate the contract unless the premium shall be paid by or before a specified date. That notice must be positive and explicit in that regard, because the purpose of it is to place before the insured in a positive manner the consequences of his failure to make the payment on or before the date fixed, when it shall be paid. If the company inform him that "You ought to pay it by that time and we have a right to declare a forfeiture if you don't pay it," that has a tendency to lull him to security; that the company, while it has that right, may not, when the time comes, decide to exercise the right; and the intention of the statute is that the insurance company shall not allow an insured person who has been in any such manner as that lulled into security so as to pass by the date when he should make his payment and then suffer a forfeiture.

"'Now the deposition of Mr. Clements as to what notice he gave, sets out that he mailed this notice, which if it had stopped with the signature of the president would have been probably a legal notice and full compliance with the statute. But that is not all of it. After the matter that is prescribed by or conformed to the statute, it goes on to say this: "Notice to policy holders. No agent has power in behalf of the company to make or to modify any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or by making or receiving any representation or information. These powers can be exercised only by the president, vice-president,

second vice-president, actuary or secretary of the company, and will not be delegated. All premiums are due and payable at the home office of the company unless otherwise agreed in writing; but any premium may be paid to an agent producing a receipt therefor signed by the president, vice-president, second vice-president, actuary or secretary, and countersigned by such agent." And this language, which is directly contradictory of the notice given in the form prescribed in the statute: "If any premium is not thus paid on or before the day when due, then except as otherwise provided, the policy shall become void, and all payments previously made shall remain the property of the company. If any premium is not paid upon the date when due, a grace of one month is allowed by the company within which the overdue premium will be accepted if paid with interest at the rate of 5 per cent. per annum. During this month of grace the policy is continued in full force. The acceptance of any premium by the company after the expiration of the month's grace is subject to the condition and upon the express warranty on the part of the holder of the policy that the insured is in good health, and is not to be construed as a waiver of the policy as to future payments, nor as establishing a course of dealing between the company and the holder of the policy. Please notify the branch office to which you pay your premium of any error or change in your post office address, in writing, giving the number of each policy now held by you," and so on.

"'Now that is part of the notice which was sent by the mailing clerk, and evidently is intended as a notice emanating from the company. The only signature that it bears is the signature of the president of the company, and it plainly informs the person to whom it was addressed that if the insurance was not paid when due and payable that he had a month's time after that in which he could pay it if he would pay it with a per cent. interest; and even after that he could pay it, but it would be accepted by the company with an implied warranty that he was still in good health and an insurable subject, the effect of which would necessarily be to lead the mind of the person to suppose that he was in no danger of losing his insurance if he failed to pay on or before the nineteenth of July; that he still had the matter open to arrangement by which he could pay and save his insurance. It is like the situation of Mother Eve. The Lord said to her: "The day that thou eatest thereof thou shalt surely die," and the serpent said, "Thou shalt not surely die," and she was left to believe which she elected to believe. This insured person is informed in one part of the notice that this insurance will be forfeited unless the premium is paid on or before the nineteenth of July. The notice goes on then with a voluminous explanation of how that effect will not take place, and it fails entirely to serve as being the warning which the statute provides must be given as a condition to the right of the insurance company to forfeit the policy.

"'I think the plaintiff is entitled to a verdict.'

"8th. The court erred in rendering and entering a judgment in behalf of the plaintiff and against this defendant upon the verdict rendered in said cause.

"9th. The court erred in not rendering and entering a judgment in this cause in behalf of the defendant.

"10th. The court erred in not granting defendant's motion to set aside said verdict, and to grant defendant a new trial of this action.

"11th. That the judgment of the court rendered in this cause is contrary to the law."

POINTS AND AUTHORITIES.

Let it be premised that there is not a syllable of evidence in the case to controvert the contention of plaintiff in error, that it duly mailed the statutory notice (Record 63, *et seq.)* to the insured on June 27, 1896, postage paid, giving him all the information required by the law of New York. There is no claim that the annual premium due on the policy in question for the year 1896, was ever paid. If the notice, confessedly given, was a substantial compliance with the laws of New York, the policy became forfeited by its own terms, and its lapsation is properly insisted upon by the company.

This narrows the question to the single proposition as to whether the notice under consideration was

a valid one. In examining this notice, it may not be improper to observe that in the minds of many persons, sometimes including judges on the bench, there lurks the thought that the statute of New York was enacted in a spirit of hostility to all insurance companies and should be construed and enforced against them with a severity and harshness worthy of a Torquemada or a Jeffreys. But that such is an erroneous view of the law is not only apparent from its repugnance to reason and an innate sense of fairness, but from the judicial utterances of the court of last resort in the state where the law was enacted. In *McDougall vs. P. S. L. A. Society*, 135 N. Y., 556, the court say: "The statute was not meant to operate harshly upon the insurer, but to afford a protection to the assured by the reasonable requirement of a notice, couched in plain terms, from the insurer, before the interest of the assured could be forfeited. To hold that where every essential fact required to be known is intelligibly stated in the notice, it may be disregarded if not literally following the words of the statutory provision, would be a most harsh and unwarrantable construction."

While the assignments of error relied upon by plaintiff in error are somewhat numerous, they may be considered under two objections made to the notice, one being urged against its admissibility in evidence, viz.: that it was given for too long a time before the premium fell due, and the other, raised by the learned judge who tried the case at the circuit, that the notice contained too much, in that some of the "fine print"

statements on the reverse of the card tended to nullify and invalidate the statutory notice proper.

II.

The objection first mentioned, as to the time when the notice is given, was based upon the assumption that the due date of the premium was not the date fixed in the policy, July 19, but was thirty days thereafter; or in other words, was the expiration of the thirty days grace allowed by the company in a clause on the back of the policy.

The law requires that the notice shall be given "at least fifteen and not more than forty-five days prior to the day when the same is payable."

The notice was mailed on June 27. Excluding this day, and including the nineteenth day of July, the notice was thus given twenty-two days before the maturity of the premium, counting the due date to be the day fixed by the express terms of the policy.

Opposing counsel contended, however, that the thirty days grace provided for, extended the due date for thirty days from July 19, to August 18, and that the addition of these thirty days to the twenty-two days, as claimed by the company, would make fifty-two days from the date when the notice was given before the premium could be said to be due. While the able judge who tried the cause below confessed to some uncertainty in his own mind on this question, he admitted the notice in evidence, and practically

sustained the contention of the company in this particular.

At page 71 of the printed record, he remarks: "Now, the deposition of Mr. Clements as to what notice he gave sets out that he mailed this notice, which if it had stopped with the signature of the president would have been probably a legal notice and full compliance with the statute." In the absence of any exception to or appeal from this ruling on the part of the defendant in error, it may be taken that the law of this case is that the notice was good, so far as the time at which it was given is concerned.

It is desirable, however, in view of its far-reaching importance in litigation which may yet arise involving this proposition, that it should be definitely settled by this Court. There is a wonderful dearth of authority in the way of adjudged cases covering this specific point. Probably this is due to the fact that elsewhere than on this coast, where this class of litigation is yet in its infancy, albeit a robust infancy, counsel and courts alike have not sought to make new contracts for the parties, but have been content to assume that the date expressly fixed by them should certainly control.

In the policy under consideration it is stipulated as follows: "This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of *one hundred and fifty-eight*

dollars and —— cents, to be paid in advance, and of the payment of a like sum on the *nineteenth* day of *July* in every year thereafter during the continuance of this policy, until *twenty* full years' premiums shall have been paid."

The italicised words are in writing, as shown in the *fac simile* appended to each copy of the printed record, and in the original policy sent up for inspection by this Court, while the remainder is the printed form.

When this policy was accepted by the insured, the minds of the contracting parties met, and the date thus expressly fixed became the due date of the policy. It is true the company has said that upon certain conditions it would allow a grace of thirty days within which the premium might be paid after the stipulated due date.

This is a matter of *favor* granted by the company to one of its members—it is a purely mutual company having no stock—and is entirely apart from and independent of the provisions of the notice law, though somewhat analogous to that provision of said act which declares that "no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice." As the notice was given on the twenty-seventh day of June, twenty-two days before maturity of the premium, the law extended time for payment for eight days after July 19, to July 27. And again, had the notice been given for the shortest

possible time of fifteen days before the due date of the premium, the nineteenth of July, this statute would have extended the time for payment, *ex vi termini*, to the fourth day of August. The company, as a matter of grace, has agreed merely to do a little more than the law compelled it to do, and extended time for payment to August 18. But this agreement on the part of the company is not an absolute one. It is conditioned upon the acceptance of the favor by the assured, and the payment by him of a five per cent. interest charge upon the delayed premium.

The assured did not avail himself of the option or favor thus offered; he did not pay the premium nor the interest penalty for the proffered grace, hence, as that portion of the contract was executory only, and was never executed, the case stands as if nothing had ever been said on the subject of grace.

Again, attention has been called to the fact that the due date of this policy is written therein in ink. We submit, if the fixing of this date by the parties is in any wise inconsistent with the provision for a conditional grace of thirty days, contained in the printed clause on the back of the policy, that then, by a familiar rule of law, the written words must prevail.

In *Leeds vs. Mechanics Insurance Co.*, 8 N. Y., 356, the court say: "The parties have, by very clear language in the written part of the policy, declared its character, and unless we give the printed portions superior significance, contrary to all settled rules of

construing such instruments, we must infer that the parties made the contract to endure for the time specified in it." See also .

People vs. Saxton, 22 N. Y., 310.

Cushman vs. N. W. Ins. Co., 34 Me., 487.

Chancellor Kent, at page 260 of the third volume of his Commentaries (13th edition), says in this connection: "If part of the policy should be written and part printed, and there should arise a reasonable doubt upon the meaning of the contract, the greater effect is to be attributed to the written words, for they are the immediate language selected by the parties, and the printed words contain the *formula* adapted to that and all other cases upon similar subjects," citing Lord Ellenborough, 4 East, 136; *Coster vs. Phœnix Insurance Co.*, 2 Wash. (Va.), 51.

See also Bishop on Contracts, Sec. 599; *Hernandez vs. Sun Mutual Insurance Co.*, 6 Blatch., 317; *American Express Co. vs. Pinckney*, 29 Ill., 392; *Howard Fire & Ins. Co. vs. Brauer*, 11 Harris, Pa., 50.

III.

We come now to the point on which this case was determined at the trial below, viz.: that the notice given, though good on its face, and in full compliance with the law had it stopped with the signature of the company's president, was invalidated by reason of the

matter printed on the reverse of the card under the heading of "Notice to Policy Holders."

The key note of the decision of the learned judge who tried this case at the circuit is found at page 71 of the record, where he says: "Now, the intention of this statute is to require the company to inform the insured that it will exercise its right to terminate the contract unless the premium shall be paid by or before a specific date."

Without this premise his argument falls of its own weight. The vice of his reasoning, we submit, may be traced to the incorrectness of his premise.

A critical examination of the statute will show that it does not say, either in express terms or by necessary implication, what the trial judge declares to be its basic intention. What the statute does say is that the "notice shall also state that unless such premium * * * shall be paid to the corporation * * * by or before the day it falls due, the policy and all payments thereon will become forfeited and void." In fact, had not the haste incident to a jury trial prevented the learned judge from more closely examining the statute in question, he would have seen, even had the policy contained no grace clause, that the company could not have forfeited the policy for nonpayment of the premium on the day it fell due, as has been already shown. And if the company could not lapse the policy until the expiration of the grace given by the law, or as in this case, until the expiration of the additional grace conditionally offered by

the company, can it be said that the law requires the insurer to do the vain thing of falsely telling the insured that it would do what it could not do, or that it was required to tell an untruth in order to make its notice good?

We submit that the law does not direct the *company* to say that it will do anything, nor *threaten* to do anything. It simply contemplates that the company shall call attention to the provisions of the contract.

It is agreed between the contracting parties, by the terms of the policy, that "if any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) *this policy shall become void, etc.*" The policy also states the amount of the premium, the place where, the persons to whom, and the date when the premium is payable. In fact, everything which the law requires to be contained in the notice is already found in the policy, and is a matter of contract between the parties. Therefore, with the policy in his possession, the assured already has notice of everything of which the statute directs the company to inform him before each recurring premium falls due. In practice the reports of the New York State Insurance Commissioner showed that many policies lapsed every year. It was evidently assumed that much of this was due to the negligence or inadvertence of the policy holders. To meet this state of facts, this paternal legislation was enacted, requiring the companies to protect their patrons against their own carelessness by reminding them of the provisions and penalties of the contracts into which they had

solemnly entered with the respective companies. That is all the act amounts to in this respect, for the notice required by its terms *does not contain a single point or fact not already expressed with care in the policy.* By no fair construction of the statute can it be said that it requires the company to inform the insured "that it will exercise its right to forfeit the policy for non-payment of premium unless such payment is made by its due date." And this is true, because, in the absence of any express waiver by the company, the policy, *by its own terms*, becomes forfeited for non-payment in accordance with the contract. Thus it appears that the only office of the law in this regard is to require the company to jog the memory of the assured, to remind him of the terms of his agreement, to protect him against himself and against his own heedlessness.

Now then, the Circuit Court substantially says that the notice in question was good, and was in full compliance with the law, had it stopped with the president's signature.

That is equivalent to saying, in other words, that the notice reminds the assured of all the points in his contract, the observance of which are especially necessary to the preservation of his rights thereunder. This being true, how can it be logically said that because the same notice, on its reverse side, formulates some of the same propositions more at length, and cites from the policy other provisions in addition to those facts contained on the face of the notice,

which facts are also all contained in the same policy, it is thereby changed from a good notice to an invalid one?

Suppose the entire policy had been printed on the back of that statutory notice, where would have been the harm? Or, if the notice had contained nothing save what appears over the signature of the president, but a slip had been placed in the envelope containing the notice, requesting or warning the insured to read his policy, could it fairly be claimed that this vitiated or nullified the statutory notice? Most certainly not. The very asking of the question obviously answers it in the only way it can be reasonably answered. And yet no more was done here, with all deference to the able judge whose opinion we venture to criticise. We reiterate that everything on the back of that notice was either taken *verbatim* from the policy or condensed therefrom, unless, it may be the request for information as to a change of address.

How could any reasonable man, or even one *non compos mentis*, have been misled to his injury, or at all, by calling his attention to his contract?

The argument of the trial court, in support of the instruction to the jury to find against the company, proceeds upon the theory that the company was seeking to cunningly entrap an unwary patron and lure him to destruction. It is submitted that the provisions in the notice, cited from the policy, will not bear this construction, and that no such construction ought to be placed thereon. A dispassionate examination of

the provisions referred to evince a disposition on the part of the company to protect and carry along its members rather than to encompass their ruin. It seems hard that provisions manifestly intended for the encouragement and protection of a company's patrons should be misconstrued into an effort to take an unfair advantage of them or used as an excuse for inflicting punishment upon itself. In accordance with the views expressed by the trial court, the company must act the unpleasant role of a medieval Shylock, whetting its knife and brandishing aloft its scales while it hoarsely demands of its victim the pound of flesh, in order to maintain its rights under the law and prevent the use of the weapon upon itself.

IV.

We submit that the court manifestly erred in refusing each of the instructions requested by plaintiff in error, as well as in giving the instruction requested by defendant in error, and in rendering judgment against plaintiff in error upon the verdict so directed against it. We respectfully insist upon each assignment of error made in this cause.

During a considerable period, in the recent history of this country, it has been popular to decry corporations because they represent aggregations of capital, independent of how wisely or beneficially that capital may be employed. To such an extent has this been carried, at some times and in some localities, that it

has amounted to a denial of justice to any corporate litigant. Latterly a crusade against insurance companies has been begun. Policies which the insured had voluntarily abandoned, sometimes for years, have been exhumed after the death of the insured, and vigorous raids have been made upon the companies to collect these lapsed policies under the provisions of a law, the consequences of which, it is safe to assume, were never dreamed of by the legislature which enacted it. It is not necessary to pronounce any panegyric upon our great life insurance companies, whose growth, solvency, and beneficence have been the pride of our country and the comfort and protection of many a home over whose doors the angel of death has placed the fatal sign of bereavement. The companies ask no favors, but they do want justice and fair treatment at the hands of the courts.

If the hostile tide of judicial legislation and interpretation is not checked, vicious precedents will be established, the evil consequences of which no one can foresee. When there has been no substantial compliance on the part of companies with the law requiring a statutory notice to policy holders, the companies must expect to submit cheerfully to the result of their own shortcomings.

But it is time to remember, in the language of the New York jurist already quoted, that "the statute was not meant to operate harshly upon the insurer," and that no strained construction of the law or hypercritical standard of compliance therewith

should be adopted in furtherance of schemes whose motive is to get something for nothing.

It is respectfully submitted that the judgment herein should be reversed.

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